UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

UNITED SCRAP METAL, INC.
Employer

13-RC-21166

and

TEAMSTERS LOCAL UNION NO. 731, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on February 26, 2004 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine whether a question affecting commerce exists concerning the representation of certain employees of United Scrap Metal, Inc. within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[1]

I. ISSUE

United Scrap Metal, Inc. (hereafter the "Employer") argues that the Regional Director dismiss the instant petition because an election would serve no useful purpose in light of its recent business decision to subcontract all existing work in the petitioned for unit. Teamsters Local Union No. 731, AFL-CIO (hereafter the "Petitioner") asserts that a question concerning representation exists and argues that the Employer's recent plans to subcontract all work in the petitioned for unit is retaliatory.

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[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

II. DECISION

For the reasons discussed in detail below, I find that a question concerning representation exists because the Employer's stated intention to subcontract out all existing work in the petitioned for unit is too speculative to bar an election. Based on this finding,

IT IS HEREBY ORDERED that an election in the bargaining unit described below be conducted under the direction of the undersigned at a time and place to be set forth in a subsequently issued notice of election:

> All regular full-time drivers employed at the facility located at 1545 South Cicero Avenue in Cicero, Illinois; but excluding all yard workers, , mechanics, dispatchers, management employees, all other employees, office clerical employees, supervisors, and guards as defined in the Act.[2]

III. STATEMENT OF FACTS

The Employer is in the business of purchasing scrap metal from various vendor sources and reselling the scrap metal to customers. In the operation of its business, the Employer employs 18 full-time drivers whose main function is to transport the scrap from the vendors' place of business back to the Employer's facility. In addition to its own drivers, the Employer also uses outside contractors or "brokers" to transport purchased scrap metal from the vendor to the Employer's facility. The Employer currently uses the broker services of seven or eight different companies.

According to the testimony of Marsha Serlin, the founding owner of the Employer, the Petitioner attempted to organize the drivers about a year ago. At that time, Serlin stated that the Employer conducted an in-house study of labor costs and discovered that using the brokers cost the company less money than using their own drivers for their transportation needs. Serlin testified the Employer shared this information with its drivers; however, the Employer did not take any other action at that time based on the information. The record did not contain any evidence regarding this study conducted a year ago, other than as testified to by Serlin.

[2] The unit description comports with stipulation of the Parties in the record. The order of exclusion has been rearranged to reflect the statutory language.

Serlin testified that a few weeks prior to the filing of the instant petition, she had a meeting with her drivers to address their concerns over wage progression and pay.[3] At this time, she directed her Corporate Financial Officer ("CFO") to conduct a cost analysis of labor costs for the drivers. According to Serlin there were several drafts of this analysis, but only one draft was entered into evidence in the form of a spreadsheet, which states that the labor cost to the Employer for use of its own drivers is $67.37 per hour.[4] Based on the results conducted from this study, Serlin stated she solicited bids from outside contractors to provide an entire fleet of trucks and drivers to perform all transportation needs of the Employer.

In response to the Employer's solicitation, two companies, Tri-Air and L.A. Truck Leasing, submitted bids which post date the filing of the instant petition that were received by the Employer within a day or two of the hearing herein. Tri-Air submitted a bid of $46.50 per hour for each tractor and driver to perform the Employer's work with five drivers. The quote contains a disclaimer, which states, "This quote is being presented based on our best estimate of your operation and the short period of time allotted for quoting." (Employer's Exhibit 2). L.A. Truck Leasing submitted a bid quoting $55 per hour per semi-truck and $ 60.00 per hour per tractor used for the job. This quote does not provide an estimation of how many drivers would be required for the job.

Upon receiving the bids, Serlin called a meeting of all the Senior Managers employed by the Employer. At this meeting, held on March 2, 2004, the Employer decided to eliminate the use of its own fleet for its transportation needs in favor of subcontracting this work to a broker for stated economic reasons. To date, the Employer has not yet entered into any contracts to contract out this work nor has it informed the affected employees of its decision. The Employer publicly announced its decision for the first time at the hearing in the instant matter.

IV. ANALYSIS:

The Board has found dismissal of a petition appropriate where a fundamental change in the nature of the Employer's business operations mandates a substantial reduction of employees in the petitioned for unit. See *Douglas Motor Corp.*, 128 NLRB 307, 308 (1960). In *Douglas Motor*, the employer, to improve its competitiveness in its market, implemented a program in which all of its production needs would be subcontracted on a date certain in the near future, eliminating 75% of the unit positions. The Board declined to direct an election and

[3] Serlin's account of the date and timing of this meeting in relation to the filing of the petition is uncertain as Serlin's admitted on cross examination that she is unsure of whether the petition was filed on February 18th or the week prior.

[4] The spreadsheet is a two-page document setting forth totals in various categories and subcategories. The spreadsheet does not show how the totals for the categories and subcategories were derived, where they were derived from, or how these figures whole or in part are attributable to hourly cost of the drivers.

dismissed the petition because the employer's plans were definite and certain. Similarly, when an employer's plan to permanently layoff all the petitioned for employees are certain and definite the Board will not conduct an election. *Hughes Aircraft Co*., 308 NLRB 82, 83 (1992) (Petition dismissed where Employer had initiated plans to subcontract out all work in the petitioned for unit in October 1991, solicited numerous bids in March 1992, informed its employees of this possibility in the interim, announced its final decision in May 1992, informed employees of the anticipated dates of layoff in early June 1992, and entered into contracts with two outside contractors to provide the work in mid-June 1992). *Douglas Motors*, supra (at time of hearing the employer had already executed certain subcontracts and was awaiting signed contracts for the production of wrecking cranes and plows and had received bids for its equipment); *M.B. Kahn Construction Co*., 210 NLRB 1050 (1974). However, the Board will not dismiss a petition where the Employer's plans to reduce its workforce are **indefinite** or **speculative** (emphasis added). In *Canterbury of Puerto Rico, Inc*., 225 NRLB 309 (1976) the Board found the employer's stated intention to cease operations was too speculative to bar an election where employer had applied to renew a 12-year tax exemption despite its corporate resolution that all manufacturing activities be terminated within 6 months and that all machinery and inventory be sold.

Contrary to the Employer's assertions, I do not find that dismissal of the instant petition is warranted in this case. The common thread present in all the cases where the Board found dismissal of the petitions appropriate is that the employer's plans for a substantial reduction in the workforce or elimination of the petitioned for unit are imminent and definite. In each instance where the employer had planned to subcontract out the work subcontracts had already been entered into for the unit work at the time of the hearing. See *Douglas Motors*, supra; *M.B. Kahn Construction*, supra. In other words, the Employer had committed itself to effectuating its plans to change its business operations and reduce its workforce. This critical element is missing from the present case. The record contained no evidence that the Employer had signed any subcontracting agreements or had otherwise committed itself to its subcontracting plans. At the time of the hearing, the record revealed that the Employer's plans were nothing more than exploratory. The record does not even show a corporate resolution to effectuate these plans such as was present in *Canterbury*; yet, rejected by the Board as sufficient evidence of an imminent and definite reduction in the workforce that is required to dismiss a petition. The bids submitted in this case for the petitioned for work are themselves vague and indefinite, reflective of the short deadline the bidders were given and/or the lack of planning and more detailed specification for bid requirements. This indefiniteness in planning and time compression in considering the subcontracting issue and obtaining vaguely based bids further demonstrates that the Employer's plans to subcontract the work of the petitioned for employees is still exploratory and are far from being concrete plans in the process of being implemented such that it shows a definite commitment by the Employer to implement within a given time frame. *Lone Star Boat Mfg. Co.*, 94 NLRB 19 (1951); *Samuel A. Ellsberry*

Company, 95 NLRB 276 (1951). I find that the Employer has failed to show that its plans to subcontract the petitioned for unit work are definite and concrete rather than merely potential or speculative plans similarly to those in *Canterbury* found by the Board to be insufficient to bar an election.[5]

V. SUM

Based on the foregoing and the entire record herein, I have found that the Employer's plans do not warrant dismissal of the instant petition. Accordingly, I have directed an election herein in the unit set forth above.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Teamsters Local Union No. 731, AFL-CIO.

[5] I do not address here the tenacity of the Employer's stated justification for subcontracting out the work of the petitioned for unit nor the Petitioner's claims that such actions are taken in retaliation for the Union activities of those employees. Unfair labor practice allegations are not properly the subject of R case proceedings.

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois 60606 on or before **March 23, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by **March 30, 2004** .

DATED at Chicago, Illinois this 16th day of March, 2004.

/s/ Gail R. Moran_____
Gail R. Moran, Acting Regional Director
National Labor Relations Board
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

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